

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel.
JEREMIAH W. (JAY) NIXON,
Attorney General,

Relator,

vs.

HONORABLE MATT BLUNT,
Secretary of State,

Respondent.

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DUPLICATE
OF FILING ON
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MAY 3 1 2004 No. SC 86013
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IN OFFICE OF
CLERK SUPREME COURT
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**RESPONDENT'S ANSWER, ADDITIONAL FACTS,
AND AFFIRMATIVE DEFENSES TO THE
PETITION FOR PEREMPTORY AND PERMANENT WRITS OF MANDAMUS**

Respondent Secretary of State Matt Blunt Responds to and answers the Petition as follows:¹

1. [The General Assembly...] Respondent denies the allegations in paragraph 1.
2. [Relator Jeremiah W...] Respondent admits the allegations in paragraph 2.

¹ Respondent submits this Answer, Additional Facts and Affirmative Defenses pursuant to Rule 84.24(g). The Relator did not use numbered paragraphs, which presents a problem for responding. In responding to the allegations in the Petition, this Answer uses numbered paragraphs then places in brackets the first three words of the referenced paragraph to assist the Court.

3. [On March 1...] Respondent admits the allegations in paragraph 3.
4. [On May 14...] Respondent admits the allegations in paragraph 4.
5. [The Secretary of...] Respondent admits the allegations in paragraph 5.
6. [On May 19...] Respondent admits that Governor Bob Holden issued a document purporting to be a proclamation that is attached to the Petition as Exhibit E.
Respondent denies all other allegations in paragraph 6.
7. [On Wednesday, May...] Respondent admits that the letter attached as Exhibit F was sent by Respondent to the Governor. The letter speaks for itself as to its text, and Respondent denies the incomplete characterization of it in the remainder of paragraph 7. Respondent is without information sufficient to form a belief as to the truth of footnote 1, and therefore denies same.
8. [Because the condition...] Respondent denies the allegations in paragraph 8.
9. [On Thursday, May...] Respondent admits the allegations in paragraph 9.
10. [On Friday, May...] Respondent admits the allegations in paragraph 10.
11. [Relator immediately sought...] Respondent admits the allegations in paragraph 11.
12. All statements in the section "Reasons to Why the Writ Should Issue" are legal argument and therefore require no response. To the extent a response is deemed necessary all statements are denied.
13. All averments not specifically admitted are denied.

ADDITIONAL FACTS

1. The Missouri Senate uses a process called enrolling and engrossing to determine the true and accurate language of all measures passed by the Missouri Senate and to correct errors. (Affidavit of Terry Spieler attached as Exhibit 1 to Respondent's Suggestions in Opposition to Relator's Petition for Writ of Mandamus, ¶ 2).
2. It is not unusual for the Enrolling and Engrossing Department of the Senate Secretary's office to find errors in the Truly Agreed to Finally Passed version of a bill. (Spieler Aff. ¶ 2).
3. Whenever errors are found in the enrolling and engrossing process, a new Truly Agreed to and Finally Passed version of the bill or resolution is prepared with the word "corrected" in brackets. (Spieler Aff. ¶ 2).
4. Under Senate Rule 70, all resolutions to amend the constitution are treated as bills. (Spieler Aff. ¶ 3 and Exhibit 3 to Respondent's Suggestions in Opposition to Petition filed May 24, 2004).
5. In 1997, the General Assembly enacted House Committee substitute for Senate Bill 132 (SB 132), amending section 116.240 RSMo to provide for ten-week notice, rather than the prior eight-week notice, for special elections to local election authorities (Affidavit of Mary Berry, Exhibit 1 hereto, at ¶ 3-4). SB 132 was signed into law by Governor Carnahan (Affidavit of Richard Struckhoff, Exhibit 2 hereto, ¶ 4).

6. The Missouri Association of County Clerks supported and lobbied for the change in section 116.240 from eight weeks to ten weeks. (Berry Aff. at ¶ 4).
7. One reason that clerks requested the extension was because of concerns about getting absentee ballots to overseas voters such as military voters. (Berry Aff. ¶ 4; Struckhoff Aff. ¶ 4). (Statement of Wendy Noren at Exhibit 3 hereto.)^{*} Section 115.281 requires absentee ballots for statewide measures to be printed and available to voters six weeks before the election. It was difficult to have the ballots printed in time for absentee voting when the notice requirement was only eight weeks. The ten-week notice requirement as opposed to eight weeks is more reasonable because it provides election authorities adequate time to prepare and conduct an orderly election. (Berry Aff. ¶ 4).
8. There are not a lot of printers who can handle orders to print ballots, and local elections authorities were not meeting their deadlines to get ballots out when the eight-week notification requirement was in place. (Statement of Noren, Ex 3).
9. The Federal Voting Assistance Program (FVAP) in the Office of the United States Secretary of Defense administers the federal responsibilities of the Secretary under the Uniformed and Overseas Citizens Absentee Voting Act

^{*} Courts may take judicial notice of stories that appear in the newspaper. *Colvin v. Carr*, 799 S.W.2d 153, 158 (Mo. App. 1990), citing *Brooks v. Stewart*, 335 S.W.2d 104, 112 (Mo. 1960).

(UOCAVA). FVAP asks states to allow a minimum of forty-five days (six weeks and three days) between the date the ballot is mailed out and the due date by which the voter must return the voted ballot to the local election official. *Legislative Initiatives* (visited May 28, 2004)

<<http://www.fvap.gov/services/initiatives.html>> (Exhibit 4 hereto).

10. On May 28, 2004, the Secretary of State received the adopted SJR 29 from the General Assembly (Exhibit 5 hereto). That same day the Secretary of State delivered it to the State Auditor (Exhibit 6 hereto). On May 28, 2004, the Secretary of State also delivered letters to Senators Kinder and Steelman asking for their advice on the proposed summary statement (Exhibit 7 hereto). Approximately one hour after the Secretary of State delivered SJR 29 to the Auditor, she delivered her proposed fiscal note and fiscal summary to the Secretary (Exhibit 8 hereto). At about the same time, the Secretary received a copy of the Attorney General's opinion approving the Auditor's fiscal note and fiscal summary (Exhibit 9 hereto).

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Mandamus does not lie because the Secretary of State has no clearly established legal duty of law that can be enforced by mandamus in that the Secretary of State had no clear duty to act until May 28, 2004, and he fulfilled his duties promptly once they were triggered.

SECOND AFFIRMATIVE DEFENSE

Mandamus does not lie because the Attorney General has an adequate remedy at law, the declaratory judgment action he filed in the Cole County Circuit Court on May 20, 2004 (Exhibit 2 to Respondent's Suggestions in Opposition to Petition, filed May 24, 2002).

THIRD AFFIRMATIVE DEFENSE

Mandamus does not lie because the Secretary of State has performed all non-discretionary duties assigned to him when he receives a resolution proposing a constitutional amendment – he has promptly transmitted the resolution to the auditor and concedes that the twenty-day time period for his preparation of the ballot summary statement began running on May 28, 2004.

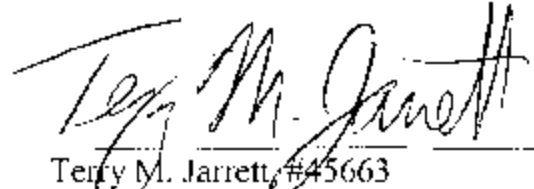
FOURTH AFFIRMATIVE DEFENSE

The Petition should be dismissed because it is moot. By the plain and ambiguous text of section 116.240, notice of a special election including the fiscal note and ballot summary statement must be transmitted to election authorities by the tenth Tuesday before the election, in this case May 25, 2004. In the absence of such notice, this court has no authority to order an election for August 3, 2004.

FIFTH AFFIRMATIVE DEFENSE

Mandamus does not lie in that the court cannot grant any meaningful relief for the reasons set forth in the Fourth Affirmative Defense.

Respectfully submitted.



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ATTORNEYS FOR RESPONDENT
SECRETARY OF STATE

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing document were hand delivered on this 31st day of May, 2004, to the following:

Paul C. Wilson
James R. Layton
James R. McAdams
Assistant Attorneys General
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